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CURRENT TOPICS.

Mr. Corkhill, United States District Attorney for the District of Columbia, has been delivering a lecture before the Medico-Legal Society of New York on the subject of "Insanity as a Defense for Crime." It will be remembered that this gentleman is the officer who prosecuted Guiteau for the assassination of President Garfield, and, as may be readily believed, there are few mempers of the profession anywhere, better informed upon that topic than he is. He says:

> So that my candid opinion, resulting from a very large experience in the trial of these cases, is, that when a prisoner proposes to defend his crime on the ground of insanity, a jury should be specially chosen for their fitness to try the special plea, and if the prisoner, after trial, is found insane, he shall then be confined in an insane prison a certain time commensurate with the character of the crime, and if the verdict of the jury is in favor of his sanity, the plea shall not then be allowed upon the trial of the cause. I have not the time to elaborate my views upon this point, nor to combat many of the constitutional and other objections that might be urged against it, but some such proceeding will in my judgment, more certainly secure a just and fair examination and determination f this difficult problem than any other way. So long as it continues to be used as it is now, as a mere subterfuge to secure the acquittal of guilty criminals, it will receive, as it should, the condemnation of all who desire to see the law fairly and honestly executed.

Something like the plan suggested has been tried in Wisconsin, and has, we believe, been found to work satisfactorily, and, moreover, upon being tested, has been held constitutional. 16 Cent. L. J., 181. Unquestionably, the effect of such a simplification of issues would be to lessen the capacity for harm of that particular kind of defense.

One of the cases decided by the Federal Supreme Court just before adjournment for the term was Ruggles v. People, in error to the Supreme Court of Illinois, which is of much importance both to public corporations and to the general public, being upon the question of the extent to which a State surrenders its control of a public corporation by a grant of special powers upon a particular subject to it. The facts were these: Lewis v, a passenger on a train of the Chicago, etc. R. Co., tendered Neal Ruggles, the conductor, eighteen cents as fare for his transportation a distance of six miles. This was at the maximum rate of three cents per mile, prescribed by the statute of Illinois then in force. The conductor demanded twenty cents, which was the fare fixed by the railroad company. Lewis refused to pay more than eighteen cents, and the conductor thereupon attempted to eject him from the car. For this act the conductor was prosecuted before a justice of the peace upon a charge of assault and battery, and fined $10 and costs. The case was then carried up through the State courts by successive appeals. A decision was finally rendered in favor of the State by its highest court, and the railroad company thereupon appealed to the Supreme Court of the United States, upon the ground that the act of the General Assembly of Illinois of April 15, 1871, fixing a maximum rate of charges for the transportation of passengers on railroads in the State, was unconstitutional and void, because it impaired the obligation of the contract contained in charters of the various companies which were merged into the Chicago, Burlington and Quincy Railroad Company by consolidation. The supreme court holds, first, that grants of immunity from legitimate governmental control are never to be presumed. On the contrary, the presumptions are all the other way, and unless an exemption is clearly established the legislature is free to act on all subjects within its general jurisdiction, as public interests may seem to require. A State may limit the amount of charges by railroad companies for fares and freight unless restrained by some contract in the charter. Second, that in the present case there is no such restraint. The State, it is true, has given the Board of Directors of the railroad company the "power to establish such rates of tolls for the conveyance of persons or property as they shall from time to time, by their by-laws determine," but such by-laws must not be repugnant to the constitution and laws of the State. If the State had not the legislative power to regulate the charges of carriers for hire, the case would be different, but that question has been settled, and the amended charter which this company secured from the legislature must be construed in the light of that established power.

EQUITIES AND DEFENSES UNDER IRREGULAR INDORSEMENTS.

A recent very able and exhaustive article[1] on the subject of "Irregular Indorsers," has undoubtedly been read with great interest. It will be remembered that the writer treated more especially of the relation between the indorser and the indorsee. The subject of this article is the relation between the maker and any party holding his note under an irregular indorsement. Upon this topic the authorities are as few as upon the other they are abundant. But few as they are, they manage to present the most glaring conflict. Where there is a plain divergence from not only the form, but also the effect, of the mercantile indorsement, it is clear that the holder takes subject to the equities and defenses of the maker. As where the words were: "This note is transferred and the collection of the same guaranteed to the holder hereof,"[2] the plaintiff was deemed to hold subject to the defenses of the maker; for the very good reason that the "note had not, in any sense, a commercial indorsement," but only a guaranty of collection, under which the indorser could not be sued until legal remedies should first have been exhausted against the maker, thus differing from the regular mercantile indorsement, and hence plaintiff could not be considered a holder under the law merchant; for "the usual and ordinary rules and regulations governing the sale and transfer of commercial paper must be observed in order to cut off defenses available as against a payee." The other cases present more difficulty to the investigator, and great conflict of opinion. Under the words, "I guarantee the payment of this note,"[3] the plaintiff was not allowed to recover from the maker any more than the payee could have recovered. The opinion is very brief, cites no authorities, and goes upon the theory that these words on the back of the note constituted an expressed contract, and therefore left no room for the admission of that implied contract of general indorsement which is presumed to exist whenever the payee indorses in blank. But directly the opposite view is held in another case,[4] also on a very brief opinion, devoid of authority, upon the words, "For value received we hereby guarantee payment of the within note, and waive demand and notice of non-payment thereof," which were held to "constitute an indorsement with an enlarged liability," thus allowing the implied contract of general indorsement to exist, together with the expressed contract of guaranty, and protecting the holder against the equities and defenses of the maker. In attempting now to ascertain which of these two views finds the greater support, it is not advisable to refer to the vast number of cases in which the contest was between the indorsee and indorser; these are all well given in the article stated;[5] they present conflicting views, and can not be deemed as offering a test for the matter in hand. The rights of the indorsee against the maker are not commensurate with his rights against the indorser, but may, under circumstances, be greater or less; for instance, the indorser, if sued, may allege failure of consideration as between himself and the indorsee, though there was full consideration to the maker. Such was evidently the opinion in the Maine case,[6] though given very briefly, in which, under "I hereby guarantee the payment of the within note," the plaintiff was held entitled to recover against the maker, free of the equities and defenses of the latter. The court reviews many contests between the indorsee and the indorser, but says "the question whether an action could have been maintained in the name of the party to whom the guaranty was made, against the maker of the note, did not and could not arise."[7] This Maine case is particularly cogent, because made in the face of an earlier decision,[8] in which the indorsee was not allowed to hold the indorser under the words, "I guaranty the payment of the within note without demand or notice." There is but one other case[9] directly in point and sustaining the holder against the maker's equities, arriving at this result in an opinion of some length,

[1] By Joseph A. Joyce, 15 Cent. L. J. 82.
[2] Omaha National Bank v. Walker, 5 Fed. Rep. 399.
[3] Canfield v. Vaughn, 8 Martin (O. S.), La. 346 (1820).
[4] Robinson v. Lair, 31 Iowa, 10 (1870).
[5] 15 Cent. L. J., 82.
[6] Myrick v. Hassey, 27 Me. 9.
[7] Except in the Louisiana case, *supra*, which it calls a *dictum*; but it looks like something more formidable.
[8] Springer v. Hutchinson, 19 Me. 359.
[9] Crosby v. Raub, 16 Wis. 628.

well reasoned, and under an indorsement decidedly irregular, *viz.*, the payee executed its bond to the plaintiff, and attached thereto the note made by defendant, reciting in its own bond that the defendant's note was transferred as security, and that both should be transferred in connection and not otherwise. A few other cases involve the question, but throw at best only an obscure light thereon. Thus[10] the holder recovered against the maker under this form of indictment: "For value received, I hereby guarantee payment of the within note, and waive presentation, protest and notice," the court quoting approvingly Robinson v. Lair, *supra;* but it is stated that the defendant offered testimony below as to the original consideration, and failed to except to the exclusion of the same. Now this looks as though, if he had excepted, the Supreme Court would have ruled upon its admissibility, a step quite unnecessary, if they meant to follow Robinson v. Lair to its full extent; for under that ruling he would be cut off from asserting any defense of the sort.

In the case of Childs v. Davidson,[11] title was made under the words: "I guarantee the payment of the within note," which were held sufficient to allow the indorsee to sue the maker; there was, however, no defense offered on the merits, and the objection was purely technical, that the plaintiff had no right to sue; there is, therefore, nothing to show whether the defendant could have proven any equity between himself and the payee. There is an indication in the opinion that he could, for it is said that: "a guaranty upon a note operated also as an assignment, and transferred the legal title;" and if these words are to be taken in their literal, or even ordinary meaning, they would prove that plaintiff, under such words, holds as assignee, and therefore subject to equities, and not as an indorsee, free from equities.

In Blakely v. Grant,[12] in which also the defense was only technical, the suit was against the drawer of a non-accepted bill; the plaintiff derived title under the following: "Should the within exchange not be accepted and paid agreeably to its contents, I hereby engage to pay to the holder, in addition to the principal, twenty per cent. damages." (Signed by the payee). This was held to be evidence of the transfer of the bill, and "in this respect the indorsement may be considered as general, and a *bona fide* holder may fill it up, by inserting above the express stipulation, a direction to pay the contents to his order for value received. But in the later and only other case[13] in which the maker was sought to be held in that State, he was decided not liable; the indorsement was: "We guarantee the payment of this note," and of this it is said: "When the name of the payee is not indorsed in blank, but is annexed to a guaranty, the purpose of the signature is said to be expressed, and there can be no implication that the purpose was to transfer the note as indorser generally."

The force of the decision is weakened by the fact there were other considerations there being great weight attached to the objection that there was another name signed under the payee's on the back of the note, making thus a joint guaranty, and putting the court at a loss to know how this could be deemed the general indorsement of the payee.

One of the latest, and of course the most important decision, is by the U. S. Supreme Court.[14] A note was made to the order of Cook County National Bank, and indorsed as follows: "For value received, we hereby guaratee the payment of the within note, at maturity or at any time thereafter, with interest at 10 per cent. per annum until paid, and agree to pay all costs and expenses paid or incurred in collecting the same. B. F. Allen, Pres't."

Holding under this title, the Trust company sued the maker of the note, but the latter was allowed to set up equities and defenses existing between itself and the payee. That no objection was found in the signature of Allen, personally, is seen from the words of the court that the indorsement expressed fully the contract "between the Cook County Bank and Trust company." But what defeated the action was that the words did not constitute a commercial indorsement.

First it is said "Allen had agreed that the note was not to be negotiated; and for this reason, perhaps, it was not indorsed," this does not seem conclusive of the plaintiffs' rights, because such agreement was, of

[10] Heard v. Dubuque County Bank, 8 Neb. 10.
[11] 38 Ill. 439.
[12] 6 Mass. 386.
[13] Tuttle v. Bartholomew, 12 Met. 452.
[14] Trust Co. v. National Bank, 101 U. S. 68.

course, unknown to it, and so far as it knew, Allen did indorse, and on the strength thereof obtained its money. The rest of the opinion seems more formidable, stating that the contract between the parties was an expressed one and "being express, it can raise no implication of any other contract. *Expressum facit cessare tacitum.* The contract can not therefore be converted into an indorsement;" and if it be deemed an assignment, the plaintiff holds subject to defenses, whilst this opinion will go far towards setting at rest the question under discussion, it does seem a little unfortunate that there are cited in it only three cases, and all of these were contests between the indorsee and indorser, which, as above suggested, do not necessarily furnish the controlling tests when the contest is between the indorsee and the maker.

This way of "mixing things up" is not at all uncommon, and the same thing was done on this topic not long ago in a magazine which is generally very accurate,[15] but it does seem that each phase of these questions should be decided by, and of, itself.

Rejecting now, once more, all decisions between indorsee and indorser, it will be found that the foregoing, are probably all the cases in the reports of this country, upon this interesting point. It would certainly be presumptous for the writer to state which of them, in his opinion, contains the better doctrine, but if the second and last named be correct they may well serve a warning to men who are inclined to say too much. Let them notice that in taking paper from the payee, the latter's simple name on the back of the instrument, gives a better security than can any amount of "iron-clad" promises.

Davenport, Iowa. A. J. HIRSCHL.

[15] Bankers' Magazine, November, 1881.

PUBLICATION AND ACKNOWLEDGMENT OF WILLS UNDER THE STATUTE OF FRAUDS.

The fifth section of the statute of frauds, 29 Car. 2, ch. 3, sec. 5, provided that all devises should be in writing, signed by the devisor, and should be attested and subscribed in his presence by three or four credible witnesses.

This statute has been substantially enacted in a majority of the States. A classification of States is important, in order to give the true value to each ruling upon the terms used in it. The following States have departed from this statute, requiring publication in express terms: Arkansas,[1] California,[2] Dakota,[3] Louisiana,[4] New Jersey[5] and New York.[6] The following States, on the contrary, have so changed this section as to dispense with attestation, though in some of them acknowledgment is required: Illinois,[7] Iowa,[8] Kansas,[9] North Carolina,[10] Pennsylvania,[11] Virginia[12] and West Virginia.[13] In such States, therefore, the judicial view of publication and attestation is largely dependent on local statute. All other States and territories, it is believed, have re enacted the 29 Car. 2, ch. 3, sec. 5.

Definition of Terms. — Publication is the express or implied declaration by the testator to the witnesses that the instrument is his will.[14] Acknowledgment is the like declaration that the instrument is his act—that he is its author.[15] Attestation is the correlative of publication and acknowledgment, and denotes the knowledge on the part of the witnesses, from the testator, that the instrument is his will or his act. Whether, indeed, it is sufficient that the testator gives the witnesses to know that the instrument is his merely, has been variously held, and involves the question of the necessity of publication under the statute of frauds. If publication be required, then the witnesses must know that the paper is a will. If acknowledgment is suffi-

[1] Gantt's Dig. (1874), sec. 5763.
[2] Code (1876), 1, p. 720, sec. 6276.
[3] Rev. Code (1877), tit. 1, ch. 1, sec. 691.
[4] Civil Code (1867), art. 1575.
[5] Stat. (1851), sec. 22, p. 1247.
[6] Rev. Stat. (1829), sec. 40, vol. 3, p. 2285; Rev. Stat. 1881.
[7] Rev. Stat. (1877), sec. 2, ch. 148.
[8] Code (1880), sec. 2326.
[9] Comp. Laws (1879), sec. 2, ch. 117.
[10] Rev. Code, sec. 119.
[11] Brightley's Purdon's Dig. (1872), sec. 6, p. 1474.
[12] Code, p. 783, sec. 4.
[13] Stat., ch. 77, sec. 3. In Kentucky the 29 Car. 2 ch 3, s c. 5, was enacted in 1797. In 1851 the form of the statute was changed requiring signature or acknowledgment in presence of the witnesses. Rev. Stat. (1860), ch. 113, sec. 5.
[14] 1 Jarman on Wills (Bigelow's ed.) 80, n.: Coffin v. Coffin, 23 N. Y. 9; Mundy v. Mundy, 2 McCar. 290.
[15] Chase v. Kitteridge, 11 Allen, 49; Allison v. Allison, 46 Ill. 61. See notes 35, 36, 37, *infra*.

cient, then they need only be informed that it is the instrument of the testator.

Rulings Favoring the Necessity of Publication.—The first case which arose under this section was that of Ross v. Ewer,[16] in 1744. Lord Hardwicke said that he considered publication essential, and not a mere matter of form. The question was not involved in the case. Moodie v. Reid,[17] was a case involving the execution of a power by will, where the instrument creating the power expressly required that the will should be published. The whole court held publication necessary under the power; but Gibbs, C. J., gave a decided opinion to the effect that no publication was necessary to a will under the statute. Here, also, the question was not in the case, since the instrument creating the power required publication. White v. British Museum,[18] has generally been regarded as an authority against publication. "Yet the question," says Judge Redfield,[19] "is very differently stated by the learned judge (Tindal, C. J.), as being whether, upon this special verdict, the finding of the jury establishes, though not an acknowledgment in fact, by the devisor to the subscribing witness, that the instrument was his will. The learned judge then proceeds to answer the question in the affirmative."

In 1838 the statute of 1 Vict., ch. 26, sec. 9, expressly dispensed with publication, and requires that the signature shall be made or acknowledged in presence of two witnesses. Lord St. Leonards, the author of this act, says of it: "The getting rid of publication is a great improvement."[20] In Spielsburg v. Burdett,[21] Lord Denman says that he does not attempt to say whether what Gibbs, C. J., said in Moodie v. Reid, about publication was law or not, but that he did not wish to be understood as acquiescing in that opinion. And Mr. Roberts, in his work on Wills,[22] seems to regard it as a doubtful point, whether publication, as above defined, was essential under the Statute of Frauds.

In the United States, various cases have raised the point, and language is found favoring the necessity of publication in strong and emphatic terms. But in none of these cases does the language seem to have been necessary to a decision. In Swett v. Boardman,[23] the language of Sedgwick, J., was *obiter*.[24] In Swift v. Wiley,[25] nor in Downie's Will,[26] approving Swift v. Wiley, did the case actually turn upon the question of publication. And in Meurer's Will,[27] the language of Taylor, J., strongly favors the view that publication is unnecessary. If the testator informs the witnesses that the paper is his will, expressly or impliedly, it is sufficient.[28] And if there be anything in the transaction which shows to the witnesses that the paper must be a will, this, without anything further to indicate its nature, has been held sufficient.[29]

Rulings Supporting the Contrary View, and Holding Acknowledgment Sufficient.—The cases of Ross v. Ewer, Moodie v. Reid, and White v. Trustees, have already been noticed. The latter is generally regarded as an authority to the effect that publication is unnecessary, and was followed in Wright v. Wright.[30] In neither case did the witnesses know the nature of the instrument.

It is not necessary that the testator should apprise the witnesses that the instrument is his will, nor that they should know its character. It is sufficient that they see him sign, or that he acknowledges the instrument or the signature to be his.[31]

[16] 3 Atk., 156.
[17] 7 Taunt., 355 (1817).
[18] 6 Bing., 310 (1828).
[19] 1 Redf. on Wills, 222, 228.
[20] See 1 Redf. on Wills, 286 n (4th ed.), and the comments of Judge Redfield.
[21] 4 Ad. & E. 14 (1835).
[22] 3d London ed., 101, 102 (1826).
[23] 1 Mass. 262.
[24] Osborn v. Cook, 11 Cush. 532; Ela v. Edwards, 16 Gray, 91.
[25] 1 B. Mon. 114.
[26] 42 Wis. 66.
[27] 44 Wis. 392.
[28] Russell v. Russell, 3 Houston, 103; Welty v. Welty, 8 Md. 15; Cramer v. Crumbaugh, 3 Md. 491; Cravens v. Falconer, 28 Mo. 19; Haynes v. Haynes, 33 Ohio St. 598; Randeburg v. Shelley, 6 Id. 307.
[29] Brown v. McAllister, 34 Ind. 375, where the fact that a number of witnesses unusual in any other transaction were present, was regarded as a sufficient publication.
[30] 7 Bing. 457.
[31] Stonehouse v. Evelyn, 3 P. W. 252 (1734); Smith v. Ellis, 1 Ves. Jr., 11 (1754); Westbeach v. Kennedy, 1 Ves. & B. 362; Peate v. Ongley, 1 Com. 197 (1719); Wallace v. Wallace, 4 Burns' Ecc. L., 100 (1762); Trimmer v. Jackson, Id. 102; Windham v. Chetwynd, 1 Bur. 421, and Bond v. Seawell, 3 Bur. (1775), per Lord Mansfield; Wright v. Wakeford, 17 Ves. 458, per Lord Eldon; Cravens v. Falconer, 28 Mo. 19; Withinton v. Withinton, 7 Id. 589; Thompson v. Davitte, 59 Ga. 472; Webb v. Fleming, 30 Ga. 808; Denpree v. Denpree, 45 Ga. 415; Smith v. Dalby, 4 Harr. 350.

Where the testator had signed the will knowing it to be such, and afterwards, either by himself or through another, requested the witnesses to subscribe, which they did in his presence, held good, though they neither saw him sign or knew the nature of the instrument.[32] "He identifies the paper by the conjunction of the two signatures, not the character of the contents; only the paper, whatever the contents may prove to be."[33] The witnesses need not see the testator sign; an acknowledgment of the signature is enough.[34] Any express or implied admission on the part of the testator, to the witnesses, that the instrument executed by him is his act, is sufficient as an acknowledgment, as by acknowledging the signature, previously made to be his.[35] or acknowledging the instrument to his, when he signs after the witnesses.[36] It need not be in words.[37] But the production of the will, already signed, to the witnesses, and saying to them, "Sign your names to this paper," held not sufficient as an acknowledgment under 1 Vict., c. 26, s. 9.[38]

Necessity of Acknowledgment.— It would seem that acknowledgment in some form must be necessary in order that the provision of the statute requiring attestation may be satisfied. "When the testator has not signed the will in the presence of the attesting witnesses and it is probably universally necessary for him to acknowledge his signature by word or act."[39] It is of course essential that the testator should himself know that the instrument is his will, and its contents.[40] But this may appear independent of the testimony of the subscribing witnesses; and cases may occur, though rarely, where there is nothing whatever to indicate to the attesting witnesses that the paper is that of the testator. Some courts appear to have gone to the length of holding the will good in such cases.[41] "Writing and signing the will is a sufficient publication; indeed, any act of the testator by which he signifies that he means to give effect to the paper as his will is a publication of the will itself."[42] Evidently this is neither publication nor acknowledgement. "'It is a sufficient publication, if it be made to appear by competent evidence, that the testator was, at the time of the execution of the instrument, apprised of its contents, that he knew it to be his will, and intended it as such.' Swett v. Boardman, 1 Mass. 258, Cilley v. Cilley, 34 Me. 162."[43]

JAMES SCHOONMAKER.

Madison, Wis.

[32] Lodge v. Lodge, 2 Houston 421.

[33] Pardee, J., in Canada's appeal. See to the same effect, Leoenett's Heirs v. Carlisle. 19 Ala. 81; Turner v. Cook, 36 Ind. 129; Reed v. Watson, 27 Id. 443; Watson v. Pipes. 32 Miss. 451; Dean v. Dean, 27 Vt. 746; Adams v. Field, 21 Vt. 256; Hall v. Hall, 17 Pick. 373; Hogan v. Grosvenor, 10 Met. (Mass.) 56; Nickerson v. Bush, 12 Cush. 332; Dewey v. Dewey, 1 Met. (Mass.) 349; Heggins v. Carlton, 28 Md. 115; Rogers v. Diamond, 13 Ark. 474; Tucker v. Oxner, 12 Rich. L. 141; Meurer's Will, 44 Wis. 392.

[34] Smith v. Codron. 2 Ves. 455; Grayson v. Atkinson. 2 Ves. 454; Ellis v. Smith, 1 Ves. Jr. 11; Addy v. Grix, 8 Ves. 504; Gaze v. Gaze, 3 Curteis 451; Webb v. Fleming, 30 Ga. 808.

[35] Chase v. Kittredge, 11 Allen, 49; Hall v. Hall, 17 Pick. 373; Sisters of Charity v. Kelly, 67 N. Y. 409; and see note 34, *supra*.

[36] Sechrest v. Edwards, 4 Met. (K'y.) 163; Dewey v. Dewey, 1 Met. (Mass.) 349.

[37] Allison v. Allison, 46 Ill. 61.

[38] Re Rawlins, 2 Curteis, 326; Re Warden, Id. 334; Hott v. Genge, 3 Id. 160; See Lewis v. Lewis, 1 Kern. 220.

[39] 1 Jar. on Wills, 80, 5th Am. Ed., Bigelow's note.

[40] Roberts v. Welch, 46 Vt. 164; Cilley v. Cilley, 34 Me. 162; Osborn v. Cook, 11 Cush. 532.

[41] Black v. Ellis, 3 Hill (S. C.) 74; Verdier v. Verdier, 8 Rich. (S. C.) 142; Gerrish v. Mason, 22 Me. 438; Rosser v. Franklin, 6 Gratt. 1; Grane v. Yerby, 12 Gratt. 239; Dewey v. Dewey, 1 Met. (Mass.) 349; Hogan v. Grosvenor, 10 Met. (Mass.) 54; Cilley v. Cilley, 34 Me. 164.

[42] Dean v. Dean, 27 Vt. 746.

[43] Meurer's Will, 44 Wis. 392, per Taylor, J.

WILL — LIFE ESTATE IN PERSONALTY — JUS DISPONENDI.

READ v. WATKINS.

Supreme Court of Tennessee, April Term, 1883.

Where a will contained ordinary words conveying the absolute title to personal property to the testator's widow, without super-added words giving unlimited power of disposition, and further, an executory devise of such property as should remain after the death of his widow, and after all her just debts are paid, to all his children, both by that and by a former marriage, and to the representatives of his deceased children, it was *held*, that the title taken by the widow under such will was not absolute but for life only, and subject to such limitations over.

H. W. McCorry, *Albert T. McNeal* and *Henry W. Bond*, solicitors for complainants; *R. W. Haywood*, solicitor for defendants.

DEADERICK, J., delivered the opinion of the court:

In June, 1877, complainant filed this bill in the Chancery Court at Brownsville, for the purpose

of having a construction of the will of his testator. Testator departed this life in December, 1869, leaving a widow and eleven children, and a large real and personal estate. He has been twice married and left living children, or their representatives, by each of his wives. He made and published his will in March, 1866, and added a codicil thereto November 18, 1869. His widow died a few years after testator's death.

The first clause of the will is as follows: "I loan to my beloved wife, Elizabeth M. Read, during her natural life, the tract of land on which I now reside, containing about twelve hundred acres, and I give and bequeath to her all my household and kitchen furniture, plantation tools and implements, carpenters tools, and all the stock of every description, such as horses, mules, hogs, cattle and sheep, and all the wagons, carts, pleasure carriages, rockaways and buggy; all the corn, wheat, fodder, oats, rye, flour, meal, etc., not heretofore disposed of to J. D. and J. H. Read."

The second clause is as follows: "I give and bequeath to my said wife after the payment of my just debts (including that I have or may execute to any of my children) all my crops of cotton on hand, except the one-fifth of the crop of 1864, and the one-sixth of the crop of 1865, which belongs to my son, J. H. Read. I also give and bequeath to my beloved wife all moneys that I may have on hand, all my bonds or notes, and moneys on deposit, if any."

Clauses three and four devise lands to his children.

The fifth clause provides: "After the death of my beloved wife, and after all her debts are paid, I devise, will and direct, that the property, real and personal, of which she may die seized and possessed, including all moneys she may leave, shall be equally divided among all my children, and representatives of my deceased children, to-wit (naming them). The children of my deceased children to represent their parents and take the shares their parents would have taken if living."

The sixth clause provides, "that should his wife give any of his children any part of the money or personal property he had given her, such child or children should account for the same on the final division of his estate, as though made by himself, so that part I may leave my wife may be equally divided among my said children."

The seventh clause directs his executor not to have a public sale of any property not disposed of by the will, but this request was not to extend to any property left by his wife.

The eighth clause and last appoints as his executor Jas. D. Read, the complainant.

The codicil confirms a conveyance of a tract of land made to his daughter by him, and which was purchased by him at sheriff's sale as the property of her husband, and she is to be charged for it $1,800, to be deducted from her interest in his estate, after his death, and the death of his wife, when his estate is divided amongst his children.

The question submitted for determination of the chancellor, was: Whether the widow took under the will a life estate only in the personal property? The chancellor held that she took, under the first and second clauses of the will, the absolute right to the personalty therein bequeathed her, and the defendants, children of the first marriage, have appealed to this court. In the case of Smith v. Bell and wife, it was held that where the bequest was "to and for her own use and disposal absolutely," and, after her decease, to be for the use of Jesse Goodwin," that the wife of testator, the first taker, took an absolute estate with unqualified power of disposition, which defeated the executory devise to said Jesse Goodwin. M. & Yerg., 302; 10 Yerg. 290; 1 Cold. 227. But in Brown v. Hunt, 12 Heisk. 409, it is held that "the power of disposition inconsistent with the devise over must be one given by the will, and not a mere incident at common law," "to the estate given to the first taker." 5 Humph., 503; 1 Swan. 185.

So that the ordinary words conveying the absolute title, will not, without superadded words giving unlimited power of disposition, defeat an executory devise. Testator in the fifth clause of his will, directs that all the property, real and personal, of which his wife may die possessed, including any money she may leave, shall be equally divided amongst all his children. And the sixth clause provides that if his wife should give to any of his children any part of the property or money he had given her, it should be accounted for on the settlement of his estate. Clause six does not contain an unlimited power of disposition of the property testator had given his wife, but may more properly be regarded as a recognition of a power to make advancements to his children, and such a limited or special power, unless fully executed, would not defeat the limitation over. In this will there is no such unqualified power of disposition, and the result is that the decree of the chancellor is erroneous, and must be reversed and a decree entered here in conformity to this opinion, and the cause will be remanded for further proceedings.

The costs of this court will be paid by the executor James D. Read, executor of Charles L. Read, deceased, out of assets in his hands.

LIFE INSURANCE—FALSE REPRESENTATIONS—WAIVER OF FORFEITURE—EVIDENCE.

EXCELSIOR MUT. AID ASS'N v. RIDDLE.

Supreme Court of Indiana, May 11, 1883.

1. In an action on a policy of life insurance it was alleged by the defendant that in his application for insurance the insured had falsely answered certain

questions, and to this the plaintiff replied that appellant, with knowledge of the fact stated in the answer, made assessments under the contract of insurance and collected the same. The reply was good. The matters alleged in the answer simply rendered the contract voidable at the election of the appellant, and it was competent for it to waive the forfeiture and continue the contract of insurance in force.

2. The relation between a physician and his patient is confidential, and he will not be permitted to divulge information obtained in the discharge of his professional duty to the injury of his patient or his representative.

Appeal from Madison Circuit Court.

HOWK, J., delivered the opinion of the court:

This suit was brought by the appellee against the appellant, upon a written contract executed on the 17th day of June, 1880, to one Aaron F. Riddle, whereby the appellant, for certain considerations expressed therein, assured the life of said Aaron F. in the sum of $2,500, for the term of seventeen years, for the use and benefit of his daughter, the appellee. It was stipulated in such contract, that if Aaron F. Riddle should die before the expiration of the term aforesaid, the sum insured was to be paid within ninety days after legal proof of death was made to the secretary of the appellant at its home office. In her complaint the appellee alleged, among other things, that on the 15th day of February, 1881, the said Aaron F. Riddle departed this life, and on the same day written proof of his death was furnished to the appellant; and that she had duly performed all the conditions of the contract on her part to be performed; that Aaron F. Riddle, during his life time, duly performed all the conditions of the contract on his part; that the appellant had not paid the said sum of $2,500, nor any part thereof, but the same remained unpaid; wherefore, etc.

The cause was put at issue and trial by the court, and resulted in a finding and judgment in favor of appellee and against appellant, for the sum of $2,500 and costs of suit.

In their brief of this case, the appellant's counsel first insists that the trial court erred in overruling the demurrer to the appellee's complaint, for the alleged insufficiency of the facts therein to constitute a cause of action. Counsel claim that the appellee was not entitled to the remedy pursued by her in this action, and that her proper remedy was by mandate to compel the appellant's officers to make an assessment upon its members, and not a direct action upon the contract. No authority is cited by counsel in support of their position, and it seems to us untenable. It has always been the rule in this State, that where a party has another specific remedy, he can not resort to a proceeding by *mandate*. Board, etc. of Johnson County v. Hicks, 2 Ind. 257; Louisville, etc. R. Co. v. State, 25 Ind. 177; State, *ex rel.*, etc. v. Board, etc. of Tippecanoe County, 45 Ind. 501.

It is clear, we think, that upon the contract in suit, the appellee had had legal remedy in the ordinary civil action. Appellant's counsel further say that the complaint suggested by counsel is, that there was no demand shown therein. Where the suit is upon a written contract, for money shown to be due thereon, it is not necessary that the complaint should aver a demand therefor before suit brought. School Town of Princeton v. Gehbert, 61 Ind. 187. The demurrer to the complaint was correctly overruled.

Appellant's counsel next discusses the alleged errors of the trial court in overruling its demurrers to the second, third and fourth paragraphs of appellee's reply to the second paragraph of appellant's answer. In this paragraph of its answer the appellant stated, in substance, that Aaron F. Riddle, in his application for the contract of insurance in suit, had falsely answered certain questions in the application, and had fraudulently concealed the truth in answering other questions, to the effect that he was then in good health: that he had not been sick for years, nor been attended by a physician; that he had no usual medical attendant; that he had any serious illness, local disease or personal injury, all which answers are alleged to have been false. In each of the second, third and fourth paragraphs of her reply the appellee alleged in substance, that the appellant, with knowledge of the facts stated in the second paragraph of its answer, made assessments against Aaron F. Riddle and the appellee, under the contract of insurance and collected and received such assessments.

We are of the opinion that the court committed no error in overruling appellant's demurrer to these paragraphs of reply. For, although the matters alleged by appellant, in the second paragraph of its answer, were such as avoided the contract of insurance by its terms, yet, in effect they simply rendered such contract voidable at the election of the appellant, and notwithstanding the existence of those matters it was competent for the appellant to waive the forfeiture, thereby authorize and continue the contract of insurance in full force. The facts alleged in these paragraphs of reply, if true, and the demurrers admitted their truth showed that the appellant had waived the forfeiture and had continued the contract of insurance in force; and, therefore, each of these paragraphs was a good reply to the second paragraph of the answer.

In its motion for a new trial, the appellant assigned eight different causes therefor; of which the first six related to the rulings of the court in the suppression of certain depositions, and parts of depositions. Of these the second and third causes, in relation to the suppression of the depositions of Dr. Jno. W. Ruthlege, are the causes chiefly complained of in argument by appellant's counsel. The testimony of Dr. Ruthlege showed that he was the attending physcian of Aaron F. Riddle, and was taken down, over the appellee's objection thereto at the time upon the ground that it was privileged. The court suppressed the depositions on the same

ground. In sec. 497, Rev. Stat. 1881, declaring what persons shall not become competent witnesses, the fourth class of such persons is as follows: Physicians as to matters communicated to them, as such, by patients in the course of their professional business, and as to advice given in such cases. There is no substantial difference between this statutory provision and the former law on the same subject, so far as the question under consideration is concerned. The law as it existed prior to taking effect of sec. 497, *supra*, was considered by this court in Masonic Mutual Benefit v. Beck, *supra*, and it was there held that the relation between the physician and his patient is confidential, and that the physician can not be permitted to divulge in a court of justice information acquired by him in the discharge of his professional duty, to the prejudice or injury of his patient or his representative. Upon this point the case cited is well sustained by authority. The court did not err, we think, in suppressing the entire depositions of Dr. Ruthlege in this case.

We have examined the other rulings of the court suppressing part of the depositions assigned as cause for a new trial, and conclude there is no available error in the record. In every instance the matter suppressed by the court seems to us to have been either immaterial or incompetent.

We can not disturb the finding of the trial court on the evidence.

Judgment affirmed.

JURY TRIAL—SCRUPLES OF JUROR AS TO DEATH PENALTY — MISCONDUCT OF JURY.

JONES v. STATE.

Supreme Court of Colorado, March 16, 1883.

1. It is not error to sustain a challenge to a juror who, on his *voir dire*, declares that he will not render a verdict when the verdict may result in the death penalty.

2. The verdict of a jury will not be vitiated by the fact of the use of intoxicating liquors while in consideration of the case, unless it affirmatively appears that prejudice to the party complaining arose from such use of liquor.

3. In a trial for murder, evidence to show the desperate character of the deceased is inadmissible, without first showing an attack by him upon the accused, of such a character as to create in the mind of the accused a reasonable belief that such attack was felonious and dangerous.

Error to the District Court of Clear Creek County.

STONE, J., delivered the opinion of the court:

Plaintiff in error was indicted and tried for murder. The verdict of guilty being without the clause involving the death penalty, the sentence imposed was imprisonment for life. The entire bill of exceptions is printed, setting out all the testimony and proceedings in the case, and we have carefully read and examined the whole 200 pages of printed record with a view of doing justice as well to the prisoner as to his counsel, who have exhibited commendable pains in presenting the case for review in this court. The errors assigned are stated as follows:

1. The court erred in sustaining challenge to James Powell, as juror.

2. The court erred in overruling challenge to Hans Iverson, as juror.

3. The court erred in excluding the offer to prove character of deceased.

4. The court erred in refusing defendant's instructions numbered seven, eight and eleven, upon the question of degree.

5. The court erred in refusing defendant's instructions numbered nine and ten, upon the question of intent.

6. The court erred in giving its instructions numbered seven and six, upon the question of intent.

7. The court erred in giving its instruction numbered fourteen.

8. The court erred in giving its instruction numbered fifteen.

9. The court erred in its entire charge taken as a whole.

10. The court erred in refusing to grant a new trial.

11. The evidence does not justify any verdict higher than manslaughter.

12. The misconduct of the jury in the use of intoxicating liquor vitiated the trial and verdict.

13. The misconduct of the jury in visiting the theater vitiated the trial and verdict.

14. The court in its charge confounds the distinctions between manslaughter and murder with the distinctions relative to punishment which the jury were at liberty to make.

The challenge, by the prosecuting attorney, of the juror Powell, was on the ground of his expressed conscientious scruples against the infliction of the death penalty. Upon his *voir dire* examination, the juror stated distinctly his unwillingness and inability to join in a verdict that would subject the convicted to the death penalty. Upon cross-examination, he was asked this question:

"Did you say that if the evidence in this case, and the law, as it should be given to you by the court, should warrant you in rendering a verdict which would result in the death of the prisoner, that your conscientious scruples are such that you could not render such a verdict?" To which question the juror answered: "I would not render such a verdict." This was, in effect, declaring that he would not assent to a verdict in accordance with the law of the land, and his oath as a juror, where the law entailed a penalty which his individual conscience did not approve. It is needless to say that the law could not be fully administered with such a juror sitting in the

case, and there was no error in sustaining the challenge.

The juror Hans Iverson, stated that he had heard something about the case, and had "partially" formed and opinion about it; that he did not know but what he had some bias in the case. Upon further examination, he stated that he knew of no reason why he could not render a fair and impartial verdict according to the law and evidence submitted, without any prejudice or bias, regardless of what he had previously heard. In answer to the question by counsel for defendant: "Would the opinion you have formed as to the guilt or innocence of the prisoner require evidence to remove it?" the juror answered, "Yes, sir." Whereupon he was challenged for cause by defendant.

In answer to further questions by the court, the juror stated that he had no settled opinion: that he did not hear about the case at Silver Plume (where the homicide occurred), but at Idaho Springs; that the persons he got his information from, learned it from reports; that he did not inquire into the matter, and that he could lay aside the opinion he might have formed about the case, and as his duty to his oath, could try the case the same as though he had never heard of it.

The question whether a juror has such an opinion, as that it would require evidence to remove it, is one quite commonly propounded by attorneys, but is no certain or proper test of such juror's qualification. I suppose that no rational person ever has an opinion upon any subject which is changed or removed except by evidence of some kind. I do not refer to sworn testimony alone, heard upon a trial; for the question is not limited, and is misleading to the ordinary juror thus questioned.

The time has gone by, if it ever existed, when a juror is held to be disqualified merely because he has heard or read something about the case he is called to try, and is intelligent enough to have formed an opinion therefrom. The proper test in such case is, can and will the juror render a verdict according to the evidence heard upon the trial impartially and fairly, under his oath so to do, regardless of his preconceived opinions; and if the juror declares upon his *voir dire* oath that he can and will so decide, there is no cause for sustaining a challenge on the ground of such previously formed opinion.

The juror in question had no fixed opinion; he had heard mere rumors at a distance from the place where the homicide occurred; he did not inquire into the matter, and he declared, as well he might, his willingness and ability to decide freely and fairly, uninfluenced by what he had heard, read or believed, respecting the guilt or innocence of the prisoner.

We have a statute upon this subject, under which a juror is not disqualified by reason of a previously formed or expressed opinion, if the court shall be satisfied upon examination that he will render an impartial verdict, (G. L. 872,) and for a full discussion of this whole question by Chief Justice Hallett. see the case of Solander v. The People, 2 Colo. 48.

There was, therefore, no error in overruling the challenge.

The third assignment questions the ruling of the court in refusing the offer or the defense to show that the deceased was of a quarrelsome and violent disposition when under the influence of liquor, in which condition he was shown to be at the time of the killing. We think the offer was properly refused. No foundation had been laid for the introduction of such testimony. The testimony shows that up to the day of the killing, there had been no quarrel between the prisoner and the deceased; their relations and intercourse had always been friendly: they had roomed together, and there was no evidence that the prisoner at the time of the killing had anything to fear from the known disposition or character of the deceased or from any previous threats, conduct or circumstances whatever. A few minutes previous to the killing, the deceased was looking for a pair of boots in the house, and not finding them, stepped to the door and asked the prisoner about them. The search was renewed, the prisoner who was unloading sacks of ore from the backs of donkeys at the door, entered the house to help look for the boots. The deceased found them just after the prisoner entered, and then said to prisoner, "I take back what I said about the boots." Prisoner resumed his work outside, and deceased who was then packing a valise just inside the open door, made some remarks about the boots in talking with a little child beside him; prisoner overhearing the remarks said, "what are you saying about the boots?" deceased replied, "I am talking to Edith," (the child.) The prisoner then said, "if you want anything off of me, just come out here." The deceased, thereupon, rose up and walked rapidly out the door towards the prisoner, who was then about a dozen feet distant, when, without another word uttered by either, the prisoner gave deceased a push or thrust with his hand in which he held an open jack-knife which he was using in cutting the pack ropes, and the deceased fell backwards into the doorway and died without speaking a word. The prisoner in his own testimony to the jury, states that the deceased first struck him on the neck with his fist; a statement to the same effect is made by the witness Clair, on behalf of the defendant, but the testimony of of this witness is, we think, fairly impeached by a number of witnesses introduced for that purpose. Upon these facts it will be seen that the testimony as to the character of the deceased was clearly inadmissable at the time it was offered, which was previous to the testimony of Clair and the defendant. Such testimony, when admitted, is for the purpose of showing a ground for belief in the mind of the slayer, that an attack made upon him was dangerous and felonious.

Hence, as a proper ground for the introduction of such testimony, an attack must first be shown,

the nature of which, together with the known violent and dangerous character of the attacking party, is sufficient ground for belief in the mind of the defendant at the time that the attack is felonious. Davidson v. People, 4 Colo. 145.

Mr. Wharton lays it down that if the offer of such testimony is general, and not connected with the *status* of the defendant at the time, the testimony must necessarily be excluded, for B's savage disposition is no reason for A's killing him. "When, however, it is clearly shown that defendant was under a reasonable fear of his life from the deceased, then the deceased's temper, in connection with previous threats, etc., is sufficiently a part of the *res gestæ* to go in evidence as explanatory of the state of defense in which the defendant placed himself." Whar. Crim. Law, sec. 641.

The prisoner in this case had voluntarily invited an attack, and the deceased in going out upon this invitation, unarmed, as the testimony shows that he was at the time, was not such an attack as to make the offered testimony, as to character, admissible under the rule.

The fourth, fifth, sixth, seventh, eighth and ninth assignments relate to the instructions to the jury, given and refused, and do not require notice in detail, but may be considered together, since the counsel for plaintiff in error fails to discuss any one specifically, or point out the particular errors relied upon.

The general fault which seems to be charged to the instruction is, that the court did not clearly instruct the jury respecting the degree of the homicide, first, as to the distinction between the degree involving the death penalty, and that punishable by imprisonment for life; and, second, as to the distinction between murder and manslaughter. As to the first point, since the verdict of the jury did not involve the death penalty, we can not perceive any ground of complaint in the instructions relating to the degrees of murder.

There were thirty separate instructions given by the court to the jury, and with such a number we can not set out or review them, or any part of them, under a vague and general charge of error, dependent as the most of them are to some extent upon each other. It is sufficient to say, that the instructions are full and fair to the defendant, and that while stating the law correctly, some of them go to the extreme limit of the rule in favor of the defendant. Under the instructions given, the jury might have found a verdict of manslaughter only, if they had believed the evidence failed to show malice in the homicide, or if they had entertained a reasonable doubt upon this point.

The eleventh assignment goes to the sufficiency of the evidence to warrant a higher verdict than manslaugter. This was a question of fact for the jury, and a careful examination of all the evidence in the case as set out in the record, leads us to the conclusion that the evidence fairly supports the verdict.

The twelfth instruction is based on the misconduct of the jury in the use of intoxicating liquors.

Upon the filing of affidavits upon this point in the court below, a thorough investigation was ordered and had by the court, and the testimony of jurors and others heard upon the whole matter. From this testimony, it appears that during the progress of the trial, the jury, or some of them, at their own expense, procured and had sent to their room, about two quarts of whisky, of which several of the jurors drank, but no considerable quantity was drank by any one. That several of them were accustomed to taking a dram every morning, and that it was procured on this occasion without any thought of harm or legal consequences arising from its use. The testimony of the jurors examined, as well as that of the bailiff in charge, was that no one was intoxicated in the least, but that on the contrary, every juror on the panel was perfectly sober at all times during the trial; and that neither their deliberations nor verdict were influenced or affected in the least by the use of the liquor partaken of.

Whether the use of intoxicating liquor by any one or more of a jury is sufficient cause for setting aside a verdict rendered by such jury, has given rise to a contrariety of opinion by the courts. This difference seems to depend much upon differences of time in judicial history, and somewhat upon differences in local prevailing sentiment. Under the English common law in early times, jurors were treated with a rigor which is unknown in modern practice, and would not be tolerated, if attempted. Jurors were confined in rooms, like prisoners, there "to be kept, without meat, drink, fire or candle, unless by permission of the judge, until they are all unanimously agreed." Blackstone's Com., Book III, 375. And if the jurors did not agree before the judges were ready to leave the town and go to another, the jurors were not discharged, but were "carried around the circuit from town to town in a cart." Ibid.

The time when the discomfort, if not torture, of jurors was considered essential to securing a just and speedy verdict, has long gone by. As to the use of liquors, the English authorities seem to hold that if the drink is not at the expense of the prevailing party litigant in the case, the verdict is not necessarily vitiated. The early cases in New York, and particularly the case of Douglas v. People, 4 Cow. 36, laid down the doctrine that the use of intoxicating liquors to any extent, vitiated the verdict.

This case was followed by the early courts of several other States, including Arkansas and Texas; but the doctrine of these cases was overruled by the Supreme Court of New York in the case of Wilson v. Abrahams, 1 Hill, 207. The cases which now hold most strongly to the doctrine laid down in Douglas v. People, *supra*, are the Iowa cases. In the case of State v. Baldy, 17 Iowa, 39, the court set aside the verdict on the sole ground that after the jury had retired in charge

of the bailiff, one of the jurors, who was permitted to separate from the others for a necessary purpose, went into a grocery store for some tobacco, and while in there drank "a glass of ale or lager beer," and immediately returned to the jury room. There was no evidence that the juror was in any way affected by this one glass of beer any more than by the tobacco which at the same time he was permitted to get and use; but the court, *per* Cole, J., in the opinion denominates it "spirituous drink," and declares that the use of such liquors "in any degree," is in itself "conclusive evidence" that the party on trial "has been prejudiced." This decision is based chiefly on that of Douglas v. People, and is followed by the case of Ryans v. Harrow, 27 Iowa, 494, notwithstanding that in the latter case it is admitted that Wilson v. Abrahams overrules all the former New York decisions to the contrary, including that of Douglas v. People.

The doctrine of these Iowa cases is opposed, not only to the great weight of authority, as will be seen by the authorities hereafter cited, but, as we think, opposed to sound reasoning. It must be borne in mind that the question we have to deal with has nothing to do with the moral or social questions involved in the use of intoxicating liquors. If a verdict is to be set aside for misconduct of the jury, it must be for legal reasons alone.

If by such conduct a party litigant, or in a criminal case, a party on trial, has been prejudiced, the verdict should be set aside, for the law requires a fair and impartial verdict. If the justness, soundness or fairness of the verdict has been impaired, or in any way vitiated, by the use of liquors by the jury, such verdict should be set aside. But if no such consequences be shown, or are fairly inferrable; if no juror was intoxicated, or in any way, manner or degree affected in his deliberations or judgment, for what reason, in such case, is the verdict to be set aside? How has the party on trial in such case been prejudiced or injured? The real question in the case is, has the party to be affected by the verdict been prejudiced by the conduct or misconduct of the jury?

The general rule as stated by Mr. Wharton in his work on Criminal Law, sec. 3111, is that "the verdict will not be set aside on account of the misconduct or irregularity of a jury, even in a capital case, unless it be such as might affect their impartiality or disqualify them from the proper exercise of their functions." In the case at bar, it not only does not appear that the misconduct complained of disqualified any juror in the proper exercise of his functions in the least, or in any degree whatever impaired the correctness or justness of the verdict; but on the contrary, the testimony to the point clearly contradicts even a presumption against the verdict.

But it is said on the other hand that the only safety lies in the rigid rule of setting aside the verdict in every case where intoxicating liquors are used by the jury, regardless of whether the jury were affected by such use or not. We can not assent to this proposition. Would such a rule prevent a repetition of like misconduct by future juries? We say no. And instead of safety, there is a manifest danger in the rule, for it would hold out an obvious temptation, and furnish an almost certain opportunity to secure a new trial in every case, by the surreptitious introduction of liquors into the jury room, and would tend to lessen the certainty of conviction in every criminal case.

Such misconduct on the part of the jury certainly deserves condemnation and punishment, and the jurors who procured and drank the liquor in this case were severely censured, and likewise fined, by the court, but this is a matter entirely apart from the question of setting aside the verdict when its fairness is not impeached.

We cite the following authorities in support of the views we have expressed upon this question: State v. Cucuel, 31 N. J. 250; Wilson v. Abrahams, 1 Hill, 207; Commonwealth v. Roby, 12 Pick. 496; Gilmanton v. Ham, 38 N. H. 108; Rowe v. State, 11 Humph. 492; Purinton v. Humphreys, 6 Me. 379; State v. Upton, 20 Mo. 397; Thompson's Case, 8 Gratt. 657; Davis v. People, 19 Ill. 74; Roman v. State, 41 Wis. 312; Westmoreland v. State, 45 Ga. 282; Kee v. State, 28 Ark. 165; Richardson v. Jones, 1 Nev. 405; United States v. Gilbert, 2 Sumn. U. S. C. C. 83; 3 Wharton, C. L., sec. 3320.

The thirteenth assignment is predicated upon upon the alleged misconduct of the jury in attending a theatre. The facts upon this point, established by the testimony of the officer in charge of the jury upon this occasion, as well as the testimony of a number of the jurors themselves are that on the evening of the same day they were empaneled, the entire jury, in charge of a sworn officer of the court, attended a theatrical play at a hall or opera house in Georgetown, where the court was setting; that they occupied seats specially engaged for them in a body; that no one occupied these seats but the jurors and the officer in charge; that they did not separate, either while there or in going to and from the place, and held no conversation or communication with any one except between themselves and the officer; that no other spectators at the theatre mingled with them; that they were all the time, while there, as well as going and coming, in charge of said officer; and that they so attended the theatre by permission of the judge of the court trying the case. These facts were not contradicted in any particular. The record is silent as to the literary or moral character of the play, whether tragic, comic or sentimental, but we think it entitled to a presumption favorable rather than unfavorable, to its quality. Since the jury were allowed this recreation, by permission of the court, and were not separated or communicated with by any one outside their body and the officer in charge, we can not say that it was misconduct, or conduct by which the prisoner was in any way prejudiced, and the

same rule which we have laid down in discussing the proceding assignment of error, must be applied to this; to-wit, that where it does not appear that the acts complained of, have affected the jury in the full and impartial discharge of their duties in trying the case and rendering a just and true verdict therein, there is no sufficient cause for holding the verdict thereby vitiated, or for such reason setting it aside.

State v. Cucuel, *supra*.

We are not to be understood as approving the practice of an indulgence to juries such as was granted here. On the contrary such a relaxation as a rule, is not to be countenanced, but in this particular instance there was doubtless sufficient reason to the court for the act, and since it appears to have been harmless, we can not hold that there was error in the refusal of the court to set aside the verdict upon this ground.

The fourteenth assignment of error is sufficiently covered by what we have said in noticing the instructions of the court to the jury.

Perceiving no error in the record, the judgment will be affirmed.

(Mr. Chief Justice Beck, before whom, as then district judge, the case was tried in the court below, took no part in this decision.)

WILL — DEVISE IN RESTRAINT OF MARRIAGE — LIMITATION OVER IN EVENT OF WIDOWER'S SECOND MARRIAGE.

BOSTICK v. BLADES.

Maryland Court of Appeals, January 12, 1883.

1. A devise by a wife of her real estate to her husband for life, "if he shall not marry," but in the event of his marriage to her brother in fee, is valid; and the husband having married again, the brother is entitled to recover in ejectment the estate so devised.

2. There is no substantial distinction between a condition imposed in restraint of a second marriage of a woman, and a like condition in restraint of a second marriage of a man. They are alike valid and effectual.

3. An objection made for the first time in the court of appeals, that the property sought to be recovered in an action of ejectment is not described with sufficient certainty to enable the plaintiff to recover, can not prevail, the case having been heard and decided in the court below upon an agreed statement of facts, by which also all errors and informalities in pleading were expressly waived.

Appeal from the Circuit Court for Talbot County.

This was an action of ejectment brought by the appellees against the appellant. The verdict and judgment of the court below were in favor of the plaintiff, and the defendant appealed.

I. C. W. Powell and *William R. Martin*, for the appellant; *J. F. Bateman* and *Philip F. Thomas*, for the appellee.

ALVEY J., delivered the opinion of the court:

This was an action of ejectment, and the case was tried and determined by the court below on an agreed statement of facts.

There is no question made in this court, as we understand, as to the nature and extent of the estate taken by Mary Jane Blades, under the will of her mother, nor as to her power to devise the estate so acquired by her. Indeed, it would be difficult to perceive how such question could be made, as by the terms of the will of the mother, the daughter took by clear and unambiguous language a fee simple estate in the land in controversy. The mother died in 1863, and some few months thereafter her will was duly admitted to probate. In 1872, Mary Jane Blades, the daughter and devisee, married the defendant, William H. Bostick, and died in 1876. She made and left unrevoked a will, executed in due form, to pass real estate, and which was duly admitted to probate. The will contained the following clause: "I give, devise and bequeath unto my husband, the said William H. Bostick, all my worldly estate, real, personal and mixed, subject to the payment of my said debts, funeral expenses and legacies, to have and to hold to him for and during the term or period after my death, that he shall remain unmarried; and if he shall not marry, then for and during the term of his natural life, but in the event of the marriage of my said husband, after my death, or if he shall not marry, then, upon his death, I give, devise and bequeath all of my said estate to my brother, Stansbury Blades, his heirs and assigns forever."

The husband, the defendant in this action, has remained in possession of the real estate devised by the will of the wife up to the present time; but in the year 1880 he married again, and thereupon this action was brought by Stansbury Blades, the brother, and devisee over, to eject the defendant.

In such state of case, the question is, as presented by the agreed statement of facts, whether or not the plaintiff is entitled to recover, under the terms and conditions of the devise by the wife,—the husband, the first devisee, having married a second time?

It would seem to be well settled by a great number of adjudications both in England and in this country, that conditions in general restraint of marriage, whether of man or woman, as a general rule, are regarded in law as being against public policy, and therefore void. But this rule has never been considered as extending to special restraints, such as against marriage with a particular person, or before attaining a certain reasonable age, or without consent. Nor has it ever been extended to the case of a second marriage of a woman; but in all such cases the special restraint by condition has been allowed to take effect, and the devise over held good, on breach of the condition. A condition, therefore, that a widow shall not marry, is, by all the authorities, held not to be unlawful. Scott v. Tyler, 2 Dick, 712; Jordan v. Holkham, Amb. 209; Barton v. Barton,

2 Vern. 308; 2 Pow. on Dev. 283; O'Neale v. Ward, 3 H. & McH. 93; Binnerman v. Weaver, 8 Md. 517; Gough and Wife v. Manning, 26 Md. 347; Clark v. Tennison, 33 Md. 85.

In the case a distinction is taken between those where the restraint is made to operate as a condition precedent, and those where it is expressed to take effect as a condition subsequent; and the decisions have generally been made to turn upon the question, whether there be a gift or devise over or not. But if the gift or devise be to a person *until* he or she shall marry, and upon such marriage then over, this is a good limitation, as distinguished from condition, as in such case there is nothing to carry the interest beyond the marriage. There can be no doubt, therefore, that marriage may be made the ground of a limitation ceasing or commencing; and this whether the devisee be a man or woman, or other than husband or wife. Morley v. Rennoldson, 2 Hare, 570: Webb v. Grace, 2 Phill. 701; Arthur v. Cole, 56 Md. 100.

In this case, if the devise to the husband had depended alone upon the terms of the first part of the devise, that is to say, the terms "to have and to hold to him for and during the term or period after my death that he shall remain unmarried," there could be no doubt it would have been a good limitation, and the estate devised to him would have terminated upon his second marriage. But we must read the whole clause together, and take one part in connection with the other, and so reading the terms of the devise, the terms that follow those just recited clearly put the devise in the form of a condition subsequent. The estate is given to the husband for life, but in the event of his second marriage, it is devised over to the brother of the testatrix; or, in other words, the devise is to the husband for life, subject to a defeasance in the event of a second marriage. By the terms of this devise, a vested estate passed to the husband for a definite duration, but by the happening of the event that was contemplated as possible, the estate, according to the contention of the plaintiff, became divested and passed over to the plaintiff.

Now, there being no question of the power of a husband to effectually impose such a condition in restraint of a second marriage of his widow, the question here is, whether a wife by a devise or gift to her husband can effectually impose a like condition in restraint of his second mariage?

Upon this precise question the books furnish but little direct authority. In our own reports the nearest case to the present is that of Waters v. Tazewell, 9 Md. 291. In that case a deed of leasehold property in trust for the sole and separate use of a *feme covert*, contained a provision that in case the husband should survive the wife, he and his assigns should have the rents and profits "during his natural life only, to and for his own use and benefit; *provided*, he should continue unmarried after the death of his wife, then living, and from and immediately after his decease," then over. This proviso was held void; but it was because, as stated by the court, that the gift over was not upon the marriage of the husband, but "from and immediately after his decease." As the court said, it was not, in terms, a gift over, based upon the event of a second marriage. "If allowed to limit or reduce the life estate, it would be giving effect to a provision, in reference to personal property, imposing, not a partial, but a general restraint upon marriage, by means, not of a precedent, but of a subsequent condition." That case, therefore, is not an authority to control in determining the present question. It is to be observed, however, that there is no suggestion or intimation by the court that there is, or could be urged, a distinction between the case of a condition as applied to a woman, and a like condition as applied to a man, in restraint of a second marriage.

In the courts of England the direct question here presented does not appear to have arisen until very recently. In 1875 the case of Allen v. Jackson, L. R., 19 Eq. Cases, 631, was decided by Vice-Chancellor Hall. In that case, the testatrix gave the income of certain property to her niece (who as her adopted daughter) and the husband of the niece during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over. The husband survived the wife and married again; and the Vice-Chancellor held, that the attempted defeasance of the husband's life interest, was void as a condition subsequent in restraint of marriage. He said he could not hold the law to be the same at to the second marriage of a man as it is to the second marriage of a woman. That the law as regards the second marrage of a woman is exceptional, and that he did not think he could extend the exception to the case of a man.

That case was taken into the Court of Appeal (1 Ch. Div. 399,) where it was fully argued upon all the principal authorities, before the Lord Justices, James, Mellish and Baggally; and upon full consideration, they all concurred in holding that the gift over took effect; and consequently reversed the judgment of the Vice-Chancellor.

Lord Justice James reasoned the matter upon principle: and he said that as there was no statute or expressed decision of any Court to the effect, that there is any distinction whatever between the second marriage of a woman and the second marriage of a man, he was unable to see any principle whatever upon which the distinction could be drawn between them. He then shows to what injustice and hardship the distinction would lead. In the case of a widow, he said, it has been considered to be very right and proper that a man should prevent his widow from marrying again; and after stating the rule, he proceeds to show with what reason and force they apply to the case of a gift or devise to a man with condition that he should not marry again. Suppose, he said, "we had the case of a married woman having property

which she had power to dispose of by her will, and she left it to her husband by reason of his being the widower, and for the purpose of enabling him to perform his duties properly as the head of the family which she may have left: it would be monstrous to say that when she provided for the contingency of the husband marrying a second time, and having a new wife and a new family, she should not be able to say, 'In that case he is to lose the estate, and is to go over for the benefit of my children.'" "In this particular case," speaking of the case before him, "it was not the wife who was doing it, but it was a person who places herself in the position of the wife—the wife's mother—and who says, making a provision for her adopted daughter, that she gives her the income of her property for her life, and then gives it, after her death, to her suviving husband, evidently in his character of widower, with a declaration that if he should marry again it should go over to the child of the daughter who was the first object she intended to provide for—a most reasonable and proper provision, with respect to which it seems impossible to suggest that there is any ground of public policy against it."

In the reasoning of Lord Justice Mellish he was equally explicit in holding the condition against the second marriage of the husband valid, and the gift over on breach of the condition effectual. And in the concurring opinion of Justice Baggallay, the present state of the English law upon the subject is summed up and stated with admirable clearness. He says: "Now the present state of the law, as regards conditions in restraint of the second marriage of a woman is this, that they are exceptions from the general rule that conditions in restraint of marriage are void, and the enunciation of that law has been gradual. In the first instance, it was confined to the case of the testator being the husband of the widow. In the next place, it was extended to the case of a son making the will in favor of his mother. That, I think, is laid down in Godolphin's Orphans' Legacy, p. 45. Then came the case before Vice-Chancellor Wood of Newton v. Marsden, 2 J. & H. 356, in which it was held to be a general exception by whomsoever the bequest may have been made. Now the only distinction between those cases and the present case is this—that they all had reference to the second marriage of a women, and this case has reference to the second marriage of a man; but no case has been cited in which a condition has been held to be utterly void as regards the second marriage of a man; and following the analogy of the other cases, there seems no reason at all why a distinction should be drawn between the two sexes as regards this matter. It appears to me that this condition is one which may fairly be treated as valid, and I think so the more for this reason.

Here is a gift in favor of a man, which, if he is not deprived of it on the occasion of his second marriage, he may very probably or very possibly settle upon a second wife, and altogether deprive the original family, which was the object of the testatrix's bounty."

We have thus stated somewhat at large the reasoning of that case, because of the entire absence of any direct authority in our own courts; and the conclusion of the Court of Appeal, founded as it is upon such cogent reason, and deduced from the principles of the common law, commends itself strongly to our assent. In the absence of any binding authority to the contrary, we are of opinion that there is no good and substantial ground for maintaining a distinction between a condition imposed in restraint of a second marriage of a woman and a like condition in restraint of a second marriage of a man. As the one is valid and effectual so is the other; and we therefore hold that the devise over to the plaintiff in this case, on a breach of the condition by the defendant, is valid, and that the plaintiff is entitled to recover.

There is another question raised in this court, and that is that the property sued for is not described in the declaration with sufficient certainty to entitle the plaintiff to recover. But that question was not raised in the court below, and the case was heard and decided upon an agreed statement of facts. The question not having been raised below can not be raised in this court for the first time. American Coal Co. v. County Commissioners of Alleghany County, 59 Md. 185. Besides, by the agreed statement of facts, all errors and informalities in pleading were expressly waived. That objection, therefore, can not prevail.

We shall affirm the judgment appealed from, and direct final judgment to be entered in accordance with the agreed statement upon which the case was tried.

Judgment affirmed.

CORRESPONDENCE.

"FIST" v. "FIRST."

To the Editor of the Central Law Journal.

Will you allow me to make a few remarks upon "A Defense of Woolridge v. State," by B. C., which appeared in 16 Cent. L. J. 378?

In the case referred to, whatever question was decided the real question was, in my opinion, this: Was it evident, beyond a doubt, that *fist* was intended to have been spelled *first*, and that, by mistake, the *r* was omitted?

Paying no attention to *idem sonans*, let me briefly ask B. C. whether a word, to be misspelled, must make an unintelligible jumble of letters? or whether one word, misspelled, may not correctly spell another word, yet still be a misspelling of the word intended? Is there any rule in Texas or elsewhere making it necessary that a misspelled word should, in its misspelled form, be wholly without meaning? In other words, taking this

same case, we will suppose, as might as readily have happened, that the verdict had read *firs*, the *t* having been omitted instead of the *r*. In this case, according to the reasoning of the court and of B. C., the question would have been to decide whether *firs* degree, hemlocks degree, spruces degree, pines degree, etc., were proper verdicts. "For the word used (in this supposed case) is *firs*, is properly spelled firs, and is a word as well defined and as well known to the English language," etc. Yet no intelligent judge would for a moment think that a jury *intended* to bring in a verdict of murder in the *fist* degree, or in the *firs* degree; or, carrying the argument *ad absurdum* as B. C. does, in the head degree, and foot degree; or, taking the other misspelling, in the pine degree or spruce degree.

The 11 Tex. Ct. of App. 32,says (Hoy v. State) "Misspelling does not invalidate a verdict when no doubt obtains as to the word intended." Does B. C. or do the judges pretend that they had a *doubt* as to what the jury intended by finding a verdict of "guilty of murder in the *fiot* degree?"

But there was no room for doubt. The man was tried on the charge of murder in the first degree, and the words on which the quibble arose bear no resemblance to second, third, fourth, or anything else but *first*. So far as concerns a verdict stating the *degree* of murder, "fist" has no more meaning, contains no more sense, than the most nonsensical jumble and the simple "happen so." That a proper word, misspelled, makes another word utterly inapplicable to the matter in question ought not to figure for a moment in a judge's opinion.

If H S C should write to B C, and commence his letter thus: "My dear Fiend," would B C claim that he was insulted, and that H S C might as well have written "My Dear Demon," or "My Dear Fallen Angel?" Would B C state that "It is to be particularly noted that here we have no case of the misspelling of a word. The word used is 'Fiend,' is properly spelled 'Fiend,' and is a word, etc." Or would B C take a little common-sense aid to make it clear, and supply the missing "r," and still remain the "Dear *Friend*," as was evidently intended?

The legal profession has suffered enough from such decisions, and it is time that our judges should decide on the *substance* and not on the *shadow*.

J. S. G.

Beloit, Kan.

WOOLRIDGE v. STATE.

To the Editor of the Central Law Journal:

In the discussions *pro* and *con* relative to the decision of the Texas court in the above case, has not the only principle by which it should be sustained or disregarded been lost sight of? Assuming it to be settled law that a verdict, like a contract or statute, should be upheld by every reasonable intendment, and that the same principles of construction govern, the decision was clearly wrong, since, by the omission of the letter "r" from the word "first," courts would never declare a contract invalid or a statute void, especially where, as in this case, the context would be left meaningless. Unless there is some new rule of construction applying to a verdict besides mere strictness, the decision rests on no basis whatever. The court relied solely on the fact that "fist" was a word as well known and established as "first." This distinction from their holding in former cases would apply only where the meaning of the whole context would be left equally as sensible and intelligible. It is merely farcial to hold "dring of spirituous liquors," to mean "drink of spirituous liquors," and not hold "fist degree of murder" to mean "first degree of murder." The principle of *idem sonans* does not strictly apply to either, and the former can be correctly sustained only on the ground that it would leave the context meaningless, as would be equally true in the latter. In construing the language of this verdict, the inherent meaning of this one word was of no consequence, inasmuch as in its relation to the whole sentence, it could not have its ordinary meaning, and could be otherwise easily and intelligibly construed. Being satisfied that "fist," in its ordinary sense, was not intended by the jury, the court were as much at liberty to ascertain their real intention, as if "frst" had been used in the place of "fist." Of the two degrees, no doubt could have existed as to which was intended by the abbreviation used. It was unnecessary to "substitute a new word with an entirely different sense," but simply to ascertain the meaning of the abbreviation, and uphold a verdict otherwise senseless.

In not doing this, all the established rules of construction were evaded, unless there is something peculiarly novel in the case of a verdict.

Minneapolis, Minn. T. K.

WEEKLY DIGEST OF RECENT CASES.

1. ADMIRALTY—COLLISION—STEAMER AND SAILING VESSEL.

Where a steamer and sail vessel are sailing in opposite courses, it is the duty of each to keep their courses and pass each other in parellel lines by keeping the green lights in view; and if the sail-vessel, by her vacillitating movements, alternately shows her green and red lights, and the steamer takes the necessary precaution to stop and reverse her engines to avoid a collision, the sail-vessel

will be held alone in fault in case of a collision. While it is the duty of a steamer approaching a sail-vessel to take all the necessary precautions by slowing, stopping and reversing her engines, it is equally the duty of the sail-vessel to keep her course while the steamer takes the necessary measures to avoid collision; and where the sail-vessel, by her frequent changes, embarrassed the action of the steamer and prevented her from continuing in a course which would have prevented the disastrous result, the sail-vessel will be held in fault. *Marshall v. "Adriatic"* U. S. S. C., March 19, 1883; 2 Sup. Ct. Rep. 355.

2. AGENCY—RIGHTS OF UNDISCLOSED PRINCIPAL.
Where an agent enters into a contract without disclosing his principal or agency, the principal, if he takes advantage of the contract, must do so subject to all the rights and equities, of which the other contracting party, who had no knowledge of the agency, might avail himself as against the agent, assuming the latter to be a principal. *Miller v. Sullivan*, S. C. Ohio, April 21, 1883.

3. ASSIGNMENT FOR BENEFIT OF CREDITORS—STATE STATUTE CONSTRUED.
An assignment for the benefit of creditors, which authorizes the assignee to violate the provisions of the statute regulating such assignments, is invalid, and is not binding on the creditors of assignor. The provisions of the State statute respecting the sale of property assigned for the benefit of creditors are mandatory and not directory, and an assignment which in effect authorizes the assignee to sell the property in any other mode or at any other time than that provided by the statute, is invalid, and not binding on the creditors. *Jaffray v. McGehee*, U. S. S. C., March 19, 1883; 2 Sup. Ct. Rep., 867.

4. CONTRACT—EXTRINSIC EVIDENCE — CUSTOM OF TRADE.
A cabinet-maker agreed with a customer, in writing, to build for him a walnut counter. The customer, finding that the top and door-panels were merely stained whitewood, sued him. *Held*, that he could not give evidence of any extrinsic understanding, nor show that it was customary to use whitewood in the manufacture. *Greenstine v. Borchard*, S. C. Mich., April 25, 1883; 15 N. W. Rep., 540.

5. CONTRACT—IMPLIED—FATHER AND SON.
1. *Semble*, That, in the absence of an express contract, the law does not imply a promise from a father to a son to pay for services rendered when the son is living with the father free of all cost for board and lodging. 2. Where the issue on trial is the value of the services of a son as clerk in his father's store, evidence of the amount of salary paid by the father to another son in the same store is irrelevant and inadmissible. *Cohen v. Cohen*, S. C. Dist. Columbia, Feb. 12, 1883; 11 Washington L. Rep., 290.

6. CRIMINAL LAW—PARDON—FRAUDULENTLY PROCURED.
An unconditional pardon by the governor, delivered to and accepted by one convicted of felony, can not be treated as a nullity, in a proceeding on *habeas corpus* prosecuted by such person against one who re-arrested him, basing his right to do so on the ground that the pardon was granted by reason of acts of such convict affecting his health, done with the fraudulent purpose of obtaining such pardon, and by reason of fraudulent representations with respect to his health, made by such convict with like fraudulent purpose. Demurrer to answer sustained and plaintiff discharged. *Knapp v. Thomas*, S. C. Ohio, April 24, 1883.

7. EJECTMENT—DEED OF TRUST — ACKNOWLEDGMENT OF SATISFACTION BY PAYEE AFTER ASSIGNMENT—NULLITY.
A deed of trust was executed to secure the payment of a negotiable promissory note; and the note was assigned to plaintiff before maturity for value. In an action of ejectment, plaintiff claimed title under said deed of trust. The deed of trust was dated in July, 1878, and defendant offered in evidence an acknowledgment of satisfaction of the deed of trust, made by the payee on the margin of the deed of trust in March, 1877. Plaintiff objected to the evidence, and offered evidence to prove that the note had been assigned to him and for value, before this time. The court overruled plaintiff's objection on the ground that plaintiff's evidence would contradict the record of satisfaction. *Held*, the effect of the evidence was not to impeach, vary or destroy the record, but to explain by showing that the party who made it acted without authority. Parol evidence to explain a record is always admissible, and the acknowledgment a nullity. *Jaerdons v. Schrimpf*, S. C. Mo.

8. EXECUTION — SALE OF FIXTURES, A SALE OF REALTY.
In a mortgage on land on which a mill was located, the mill and fixtures were excepted from the conveyance; *held*, that neither the reservation of fixtures from the deed conveying the land nor their temporary severance from the land, changes their legal character as part of the realty; and in selling such fixtures under execution, all the requirements for the sale of real property must be complied with. *Davis v. Eastham*, Ky. Ct. App., April 17, 1883; 3 Ky. L. Rep. & J., 850.

9. FEDERAL SUPREME COURT—APPEAL—JURISDICTIONAL AMOUNT.
The Supreme Court has jurisdiction, on writ of error or appeal by the plaintiff below, when he sues for as much or more than the statutory amount required to give jurisdiction, and recovers nothing, or recovers only a sum which, being deducted from the amount or value sued for, leaves a sum equal to or more than the jurisdictional limit, for which he failed to get a judgment or decree. On error or appeal by a defendant, the Supreme Court has jurisdiction when the recovery against him is as much in amount or value as is required to bring a case into this court, and when, having pleaded a set-off or counterclaim for enough to give this court jurisdiction, he is defeated upon his plea altogether, or recovers only an amount or value which, being deducted from his claim as pleaded, leaves enough to confer jurisdiction, which has not been allowed. The amount as stated in the body of the declaration, and not merely the damages alleged, or the prayer for judgment, at its conclusion, must be considered in determining whether this court can take jurisdiction. *Hilton v. Dickinson*, U. S. S. C., March 26, 1883; 2 S. C. Rep., 424.

10. JURY TRIAL—IRREGULAR VERDICT—IMMATERIAL OMISSION.
This action was brought to recover $26.60 for board furnished by plaintiff to defendant. The answer admitted the furnishing of the board and its value as alleged in the complaint, but alleged by way of

defense that it was furnished under an express contract between plaintiff and one W; that W, and not defendant, was to pay for it; and that plaintiff was to furnish it on W's account and look to him for payment. The only issue being whether defendant or W was liable, the jury found the following verdict: "We, the jury, find for the plaintiff;" upon which the court entered judgment for plaintiff for $26.66. *Held*, that the verdict was sufficient to sustain the judgment; that it fully responded to the issue made by the pleadings, and can be made sufficiently certain by reference to the record. The question of value not being in issue, and the amount of plaintiff's recovery being fixed by the pleadings, and following as a conclusion of law in case the jury found in his favor upon the issue of fact submitted to them, the omission of the jury to insert the amount of such recovery in their verdict was at most a harmless irregularity. *Jones v. King*, S. C. Minn., May 1, 1883; 15 N. W. R., 670.

11. MANDAMUS—JUDICIAL DISCRETION — STIPULATION.
Where the circuit court, on appeal from a decree in admiralty, has jurisdiction to enter a decree against the stipulators as well as the claimant, in a suit for collision, pending an appeal to this court a *mandamus* will not issue from this court to vacate such a decree against the stipulators. *Ex parte Warden*, U. S. S. C., March 26, 1883; 2 S. C. Rep., 383.

12. MUNICIPAL BONDS—CORPORATE PURPOSES.
Where, under the State Constitution, the corporate authorities of the State can not be invested with power to levy and collect taxes except for corporate purposes, the power contained in a city charter to borrow money does not authorize the issue of bonds, unless they are issued for a corporate purpose. *Held*, that the improvement of the water-power upon rivers within the city, or in its immediate vicinity, for the purpose of bringing the water into use, to be leased or sold, for the development of the manufacturing interests of the city was not a corporate purpose, and bonds issued for such a purpose are void, even as to *bona fide* holders. *City of Ottawa v. Carey*, U. S. S. C., March 19, 1883; 2 Sup. Ct. Rep. 361.

13. MUNICIPAL CORPORATION—GUARANTY OF BONDS.
An act of the legislature authorizing the corporate authorities of a city to borrow money for works of internal improvements, *held*, to include a guaranty of the payment of bonds issued by a railroad company for money to pay debts incurred for construction already made, and for future improvements. *City of Savannah v. Kelley*, U. S. S. C., April 2, 1883; 2 Sup. Ct. Rep. 468.

14. PARTNERSHIP—INDIVIDUAL DEBT.
A, doing business alone and indebted to B on book account, entered into partnership with C, and became the managing partner of the firm. B was notified of the partnership, supplied the firm with goods, entered A's indebtedness on the statements of the firm's account, and received from A at different times checks of the firm which were applied to A's indebtedness. No intentional concealment and no fraud appeared in the transaction. *Held*, that B was not entitled to apply the firm checks to A's debt. *Held, further*, that the firm could not recover in set-off the excess of the firm's checks over firm's purchases. *Held, further*, that the firm was entitled to the benefit or the misapplied fund in payment of B's claim against the firm. The technical rule which prevents a co-partnership from suing at law to recover funds misapplied by a partner should not be applied to defenses further than is clearly required. *Cornells v. Mumford*, S. C. R. I., February 10, 1883; Advance Sheets of 14 R. I. Reports.

15. PUBLIC LANDS — CONFLICTING CLAIMS — PRE-EMPTION RIGHTS—DECLARATION OF INTENT TO PRE-EMPT.
The land department is a tribunal appointed by Congress to decide contests for the right to enter a tract of land between rival claimants, and when finally decided by the officers of that department the decision is conclusive everywhere else as regards all questions of fact; and where fraud or imposition has been practiced on the party interested, or on the officers of the law, or where these latter have clearly mistaken the law of the case as applicable to the facts, courts of equity may give relief; but they are not authorized to examine a mere question of fact dependent on conflicting evidence, and to review the weight which those officers attach to such evidence. When a party has filed his declaration of intention to claim benefits of the right of pre-emption under section 2261 of the Revised Statutes, for one tract of land, he shall not at any future time file a second declaration for another tract. *Baldwin v. Starks*, U. S. S. C., April 2. 1883; 2 S. C. Rep .473.

16. REMOVAL OF CAUSES—CITIZENSHIP OF CORPORATION IN SEVERAL STATES.
The Memphis & Charleston Railroad Company is made by the statutes of Alabama, an Alabama corporation; and, although previously incorporated in Tennessee also, can not remove into the Circuit Court of the United States a suit brought against it in Alabama by a citizen of Alabama. *Memphis etc. R. Co. v. State of Alabama*, U. S. S. C., April 2, 1883; 2 S. C. Rep. 432.

17. REVENUE LAW—CUSTOM DUTIES—TARIFF ACT CONSTRUED.
If an article is found not enumerated in the tariff laws, the first inquiry is whether it bears similitude, either in material, quality, texture, or use to which it may be applied, to any article enumerated as chargeable with duty. If it does, and the similtude is substantial, then it is to be deemed the same and to be charged accordingly. If nothing is found to which it bears the requisite similitude, then an inquiry is to be instituted as to its component materials, and a duty assessed at the highest rates chargeable on any of the materials. *Authur v. Fox*, U. S. S. C., March 19, 1883; 2 S. C. Rep. 371.

18. REVENUE LAW — INTERNAL REVENUE — CIGAR MANUFACTURERS—STATEMENT AND BOND.
A manufacturer of cigars, in his statement furnished in May, 1878, under section 3387 of the Revised Statutes, according to form 36 1-2, set forth "the room adjoining the store in the rear, on the first floor" of certain premises, as the place where his manufacture was to be carried on. Circular No. 181, issued in March, 1878, by the commissioner of internal revenue, required that a cigar factory should be at least an entire room, separated by walls and partitions from all other parts of the building," and that the factory designated in form 36 1-2 should not any part of it "even though marked off or separated from the remainder by a railing, counter, bench, screen or curtain, be used as a store where the manufacturer can sell

his cigars otherwise than in legal boxes, properly branded, labled and stamped." This circular went into effect May 1, 1878. The manufacturer was engaged at the same time and place in doing business as a dealler in tobacco, having paid the special tax as such, and also the special tax as a manufacturer of cigars. He did not comply with the said circular, and had no division between the factory, in the rear part of the room, and the front part of the room, where he sold articles as a dealer in tobacco, except a wooden counter extending part of the way across the room, and some three feet high. He sold out of a show-case in the front part, in quantities less than 25, from stamped boxes, which were duly branded, marked and stamped, cigars which he had made in the rear part, on which cigars the tax had been paid. For doing so, as a violation of section 3400, in removing cigars made by him without the proper stamps denoting the tax thereon, a quantity of cigars, the property of the manufacturer, found in the rear part of the room, in boxes not stamped were seized as forfeited to the United Stated, under section 3400. *Held*, 1. The requirements of the circular were within the power of the commissioner to prescribe, under section 3396. 2. The sales at retail were in violation of law. 3. The forfeiture claimed was incurred. The provisions of section 3236, and subdivisions 8 and 10 of section 3244,and sections 3387,3388,3390 and 3392, considered, and *held* not to authorize such sales, they constituting, under sections 3392, 3397 and 3400, removals of cigars from the place where they were manufactured, without the proper stamp denoting the tax thereon, because the sales were sales of cigars by their manufacturer, at retail, at the place of manufacture, not in stamped boxes, the cigars being in his hands as a manufacturer and not as a retail dealer. *Ludloff v. United States*, U. S. S. C., April 2, 1883; 2 S. C. Rep. 475.

19. WILL—LIFE ESTATE IN PERSONALTY—DEVISE OVER.

A testator gave his widow an estate for life in his entire property, and added a residuary clause providing that on her decease it should be equally divided between his "suviving children." *Held*, that, under the rules of construction that have always prevailed in Michigan, the will vested an estate in all the children surviving at his death, and that the heirs at law of any child who died before the widow, were entitled to the share of their ancestor, unless the will indicated otherwise. Terms used in wills are generally to be construed as having the meaning which has become generally accepted, but they are also to be construed in connection with the rest of the wil. *Porter v. Porter*, S. C. Mich., April 25, 1883; 15 Nep. W. R. 550.

QUERIES AND ANSWERS.

*[*** The attention of subscribers is directed to this department,as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must,for want of space, be invariably rejected. Anonymous communicationsare not requested.*

QUERIES ANSWERED.

Query 15. [16 Cent. L. J. 138.] Is a public highway, to-wit.: A county road, over lands, an incumbrance within the meaning of the covenants of warranty, and against incumbrances. Please cite authorities.

Answer. An incumbrance is a right of a third person, in the land in question, to the diminution of the value of the land, though consistent with the passing of the fee by the deed of conveyance. It can make no difference whether that third person is an individual, a company or a corporation, either private or public. The diminution in value is as great where the property is incumbered by a public highway, as by private passage, obtained by contract. The public has such a right in its highways that it can not be divested of them by a private individual, consequently it is a right that must prevail, and the fact that the incumbrance is of a public nature and the records of the State furnish a constructive notice to the vendee of the rights of the public, or that he had actual personal notice of its existance, has been held in numerous cases to be no bar to his right of action. There are numerous cases holding that a right of way of a railroad is an incumbrance for which a covenantee may recover. Barlow v. McKinley, 24 Iowa, 69; Beach v. Mills, 51 Ill. 206; Kellogg v. Maline, 50 Mo. 500. None of which considers the publicity of a right of way of a railroad as beyond the liability of an incumbrance. There are but few, if any, of our Western courts that have recorded an opinion upon this identical question. But in Maine, Massachusetts, New Hampshire and Connecticut, it has been expressly held that a public highway over and upon property sold under warranty against encumbrances,comes within the warranty, and a right of action existed. Hays v. Young, 36 Me. 561; Kellogg v. Ingersoll, 2 Mass. 101; Prichard v. Atkinson, 3 N. H. 335; Hubbard v. Norton, 10 Conn. 431. This question was formerly held in the negative by the Indiana courts. Scribner v. Holmes, 16 Ind. 142. But that case was lately reversed, and now the affirmative is held, by a well-compiled and elaborate decision in Burk v. Hill, 48 Ind. 52. But in Pennsylvania and New York the courts are inclined to hold that the purchase is made subject to the public highways, and that they are not a violation of the warranty. Wilson v. Cochran, 46 Pa. St. 232; Patterson v. Arthurs, 9 Watts, 152; Whitebeck v. Cook, 15 Johns. 483. With these two exceptions, Kellogg v. Ingersoll, *supra*, has been followed with approbation in all of the courts that have considered the question, so far as I am able to ascertain. SANS CULLOTTE.

Council Bluffs, Iowa.

Query 36. [16 Cent. L. J. 339.] Husband and wife, in 1865, make a deed purporting to convey in fee a tract of the wife's land in Arkansas, whereof the wife at the time was seized of one moiety only. She afterwards acquires the other moiety. Having become a widow, can she maintain ejectment for the after-acquired moiety? The rule in Van Renssalaer v. Kearney, 11 How. 297, is statute law. X.

Jacksonport, Ark.

Answer No. 1. No; As soon as she acquired the other moiety, it vested at once in her grantee under deed in fee simple. and she retains no interest in the land at all, so consequently can not bring suit in ejectment. 8 Kan. 112; Wait's Actions & Defenses, vol. 2, p. 508, and authorities there cited. G.

Beloit, Kansas.

Answer No. 2. The operation and effect of a deed,

as an estoppel against a person *sui juris*, is well established, but that branch of the law of estoppel which applies to married women is by no means settled, and a very great diversity of opinion, both in adjudged cases and in the treatises of law writers, prevails. Many of the cases, which were once authority, have been overruled; thus in Van Rensselaer v. Kearney, 11 How.; Massie v. Sebastian, 4 Bibb; Hill v. West, 8 Ohio; Fowler v. Shearon, 7 Mass., Nash v. Spofford, 10 Met. (Mass.) By reference to the following cases, it will be seen that the foregoing have not been very generally recognized. Jackson v. Vanderheyden, 17 Johns.; Martin v. Duelly, 6 Wendell; Wadleigh v. Glines, 6 N. H.; Derr v. Demarest, 1 Zab. (N. J.) The doctrine of estoppel does not apply to married women, not being *sui juris*. Kelley's Cont. Mar. Wom., p. 122, citing Stephenson v. Osborne, 41 Miss.; Lowell v. Daniels, 2 Gray and Fowler v. Fisher, 77 N. C.; Big. on Estop., 276, 485-490; Rawle Cov. on Title, 420-430; Herman on Estop., 235. The case of King v. Rea, decided in Indiana in 1877, is the most recent case called to mind wherein these overruled cases have been cited with approbation. 7 Mass., 4 Bibb.; 11 Hoar and 8 Ohio. The weight of authority, in our judgment, is opposed to the estoppel of married women from setting up an after-acquired title, unless she conveyed *sui juris*, and not under disability. But in Missouri, Illinois and Arkansas, the doctrine of Van Rensselaer v. Kearney, has been adopted. Rev. St. of Ark. ch. 37, sec. 4, in force in 1860. F.

Springfield, Mo.

Query 37. [16 Cent. L. J. 339.] A owns land through which he builds a sewer eight feet below the surface. He then sells the sewer to X, with right to use, maintain and repair the same. He then sells the land to B, with covenants of warranty and against incumbrances, B having full knowledge of the sewer. B sells to C with like covenants. C sues A on the covenants in the deed from A to B. Can he maintain his action? Why? Why not?

Lowell, Mass. MASS.

Answer No. 1. The majority of American decisions, and the weight of authority, consider covenant against incumbrances a personal covenant, a chose in action technically not assignable, and not one running with the land; consequently can be taken advantage of only by the covenantee or his personal representative, and can not pass to an heir, devisee or subsequent purchaser. F.

Springfield, Mo.

Answer No. 2. In Massachusetts the action may be maintained. A covenant against incumbrances is broken when there is a pre-existing right in a third person to pass over or upon the conveyed premises, for any personal matter whatever; as, to carry water from a spring, to cut or maintain a drain, or other artificial water course. Smith v. Sprague, 40 Vt. 43; Prescott v. White, 21 Pick. 341; Prescott v. Trueman, 4 Mass. 630. In Massachusetts, this covenant runs with the land by statute, and when broken a right of action accrues to the grantee, his heirs, etc., and assigns. Gen. Stat., ch. 89, sec. 17. 282

Council Bluffs, Iowa. SANS CULOTTE.

Query 39. [16 Cent. L. J. 339.] A and B have fields adjoining. Our statute provides that adjoining land owners shall each erect half of the partition fence. A builds his half of the fence, and notifies B that he (A) intends putting stock into his close, and for B to erect his share of the partition, lest his (A's) stock damage B's field. B neglects to put up his fence as required by statute, whereby A's cattle stray into B's field and do damage thereto. Will an action lie against A under the herd law, for damages which arose wholly through B's laches in not building his partition fence? In other words, can B take advantage of his own negligence, and recover damages from A? C. G. H.

Baxter Springs, Kan.

Answer. B can not recover damages from A for such injuries, unless A wilfully and maliciously drove his cattle on B's field. 5 Kan. 433; 7 Kan. 592; 13 Kan. 74. 1 Thompson on Neg., 211. Failure to perform statutory duty is negligence *per se*. 1 Thompson on Neg. 558; 2 Ib., 1232. G.

NOTES

——The practice of experimenting before judges is likely to receive a check, if it is often followed by such results as happened in a case before Mr. Justice Pearson last week. Two German firms were disputing the exclusive right in certain patents for improvements "in the production of coloring matters suitable for dyeing and printing." The contention of the defendants was that the chemical means described in the specification were impossible, because, if the "oxyazo-napthalinoine" were to be united with the "fuming sulphuric acid" of the strength therein described, it would be dangerous to human life; and an experiment *coram judice* was proposed. In an unguarded moment the judge consented, and adjourned to an empty room, where the baleful mixture was concocted, by adding a teaspoonful of the unpronouncable liquid to an ounce of fuming sulphuric acid. The result was terrific. "So dense and poisonous were the effects of the fumes which arose, that judge, counsel, witnesses and bystanders fled, "with the utmost precipitancy, to avoid being asphyxiated on the spot." Her Majesty's judges are brave men; but, even in the search for truth, they ought not to be exposed to dangers hitherto reserved for combatants in China; and the smoking out of the Royal Courts of Justice, as if it were a nest of hornets, is a contempt of court for which none of the penalties provided by the Lord Chancellor's bill is adequate.—*Law Journal.*

——Among the professional reminiscences of Daniel O'Connell, when at the Irish Bar, was the following unique instance of a client's gratitude. He had obtained an acquittal, and the fellow, in the ecstacy of his joy, exclaimed: "Och, counsellor, I've no way here to show your honour my gratitude, but I wisht I saw you knocked down in my own parish, and maybe I wouldn't bring a faction to the rescue."